Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

GONZALO BARRIENTOS, *et al.*,
Appellants,

v.

STATE OF TEXAS, *et al.*,
Appellees.

On Appeal from the United States District Court for the Southern District of Texas

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the district court erred in dismissing Appellants' claim that the Texas Legislature's change from requiring a two-thirds vote to consider legislation to a simple majority requirement, which was applied solely to congressional redistricting legislation, was a change requiring preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. §1973c.

2. Whether, under Section 5 of the Voting Rights Act, a covered jurisdiction must submit for preclearance to either the United States District Court for the District of Columbia or the Attorney General a change it makes in practices or procedures targeted solely to redistricting legislation?

PARTIES TO THE PROCEEDING

Actual parties to the proceedings below were:

(1) Gonzalo Barrientos, Rodney Ellis, Mario Gallegos, Jr., Juan "Chuy" Hinojosa, Eddie Lucio, Jr., Frank L. Madla, Eliot Shapleigh, Leticia Van De Putte, Royce West, John Whitmire, and Judith Zaffirini, plaintiffs, appellants, herein;

(2) State of Texas, defendant;

(3) Rick Perry, Governor of the State of Texas, defendant; and

(4) David Dewhurst, Lieutenant Governor of State of Texas and presiding officer of the Texas Senate, defendant.

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STATE OF TEXAS, *et al.*,
Appellees.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court is reported at ___ F. Supp. 2d ___, 2003 WL 22113910, S.D. Texas, September 12, 2003, and is reprinted at App. 1a-4a.

JURISDICTION

The Memorandum and Order denying plaintiffs' motion for preliminary injunction was entered on September 12, 2003. Appellants filed a notice of appeal on September 22, 2003. App. 5a-6a. The jurisdiction of this Court rests on 42 U.S.C. § 1973c and 28 U.S.C. § 1253, and 22 U.S.C. § 2284.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, is set forth in App. 26a-27a.

STATEMENT OF THE CASE

Appellants appeal the dismissal by a three-judge federal district court of their claim that a change in the practices and procedures of the Texas Senate (hereafter "the Senate") targeted exclusively to congressional redistricting legislation requires preclearance under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c. Specifically, appellants claim that the abandonment of the Senate's usual practice of requiring the votes of a supermajority of two-thirds or better to take up legislation[1] – a change applied only to this year's controversial Texas congressional redistricting bill – is a change in a "standard, practice, or procedure with respect to voting" within the meaning of Section 5. The district court's ruling that no change in a legislature's internal operations – no matter how focused on election procedures and no matter how consequential in affecting election outcomes – can be a covered change is without support in the Act or this Court's decisions.

Appellants are eleven voters and State Senators from Texas. App. 8a They represent the only minority opportunity Senate districts in the State; seven of the appellants are Hispanic, two are African-American, and the

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[1] The State of Texas conceded below that Texas has a "tradition" of using a practice or procedure that forces a supermajority 2/3 vote on bills in the Senate if they are taken out of order. See Defendants' Motion to Dismiss at 4 (calling the use of a blocker bill a "tradition") and at 4, note 1 (referring to the blocker bill as an "informal tradition").

remaining two are Anglo Senators who represent majority-minority districts. App. 8a. Ten of the 11 districts appellants represent are majority-minority and the eleventh is approximately 45% minority in total population. *Id.* Appellants constitute more than a third of the thirty-one member Texas Senate and wished to avail themselves of the supermajority practice or procedure in the 2003 special session on redistricting.

Prior to 2003, the Senate had used a practice or procedure whereby congressional redistricting bills could only reach the floor of the Texas Senate if they obtained the support of a supermajority (two-thirds or better) of the Senators present. In 2003, the State changed the Rules to allow congressional redistricting legislation to be considered and passed with the support of a mere simple majority. Furthermore, the State made the change from a supermajority to a simple majority rule only applicable to congressional redistricting legislation.

The record below is unambiguous with respect to the procedures used in the Texas Senate for enacting congressional redistricting legislation. The use of the supermajority requirement extends back over many decades and was detailed below by two experts on Senate practices and procedures. App. 30a-60a. These sworn statements do not differ on the fundamental factual basis for appellants' claim that the Texas Senate has used some kind of supermajority requirement or practice each time it has enacted congressional redistricting legislation and that this practice was changed in 2003.

In the Texas Senate, bills emerging from Senate committees are placed on a list in the order in which they were reported from the committees. App. 36a. This list is

called the "Senate Calendar." If the Senate followed "the regular order of business," it would consider the bills in the order they appear on the calendar and the Senate would not be able to consider a bill listed somewhere down the calendar until it had completed action on all those that precede it on the list. *Ibid.* But the Senate often suspends the regular order of business, a "tradition" whereby bills may be "brought up out of the regular order" by a suspension motion. *Id.* The suspension motion requires a two-thirds vote and is designed to ensure that, before a bill comes to the Floor, it has the support of an overwhelming percentage of the senators. *Id.* It also gives the Senate a way to move important bills directly to the Floor, bypassing the many less significant measures that may precede it on the calendar. *Id.*

The usual practice or procedure that the Senate has used to ensure that no bill comes to the floor unless it has support from a supermajority of senators has been to place or "park" a bill at the very top of the calendar that it never intends to pass. App. 44a. This bill--known as the 'blocker'--serves as a barrier to consideration of all other legislation unless the regular order of business is suspended. *Id.* No effort is made to debate and pass the blocker bill; consequently, none of the bills behind it on the calendar can be considered unless a motion is made to suspend the regular order of business. The motion to suspend requires the support of two-thirds of all the senators present and voting at the time. This means that if all 31 senators are present, it will require 21 votes in favor of the motion to bring up the bill. If 30 are present, it will take 20, and so forth.[2] *Id.*

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[2] What makes the Senate's procedure unusual is that, once a normal bill or resolution has been moved off the calendar for debate by suspending the rules, only a simple majority vote is then needed for the Senate to

The evidence adduced below showed that blocker bills have been used to require supermajority support for congressional redistricting bills in the past and that in other instances the Texas Senate effectively accomplished the same thing by requiring a supermajority vote to suspend other rules prior to the consideration of redistricting legislation. Of the greatest significance is what occurred in 1971, immediately prior to the time when section 5 of the Voting Rights Act became applicable to Texas. In the 1971 regular session, the Texas Senate voted to suspend the regular order of business by unanimous consent to take up congressional redistricting. To suspend the Regular Order of Business requires an extraordinary or supermajority vote of the senate (a two-thirds vote). The Legislature ultimately failed to enact a congressional redistricting bill, however, and the matter was taken up in a special session. "In the first called special session of 1971, congressional redistricting legislation passed by a combined motion to Suspend the Regular Order of Business, pass on Second Reading, Suspend the Constitutional Rule and Pass on Third Reading. This practice or procedure required an extraordinary or supermajority of votes in order to pass." App. 49a.

"Thus, as of 1971, the practice or procedure used by the Texas Senate in considering congressional redistricting employed an extraordinary majority requirement before the full Senate would consider such legislation." App. 49a. That is the benchmark "practice or procedure" used by the Texas Senate at the time Section 5 of the Voting Rights Act took effect in Texas (*i.e.*, November 1, 1972).

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pass it. Thus, while it only takes 16 votes to pass a bill--if all 31 senators are voting--it takes five more votes just to allow the bill to reach the floor for discussion. App. 44a-45a.

Similar patterns continued in later years. "In 1981, Congressional Redistricting in the Senate during the 67th Legislature was governed by the terms of a Senate Resolution (SR 256), which provided that reapportionment measures were to be placed before the Senate under a Special Order, rather than by a Suspension of the Regular Order of Business. SR 256 was adopted by the Senate by a vote of 27 Aye, 1 Nay, and thus was approved by a supermajority." App. 49a-50a. "SR 256 established that these Special Orders would require only a majority vote for adoption, rather than the two-thirds vote normally required to set a Special Order. The specific provision providing for a Special Order by a majority vote was adopted on a separate vote of 21 Aye, 7 Nay—again a supermajority (three-fourths) of senators." App. 50a.

"In 1991, an attempted suspension of the Regular Order of Business by unanimous consent, failed; then the Senate voted to suspend the Regular Order of Business, a measure that requires two-thirds of the Senate, by a vote of 21 Aye, 10 Nay. Thereafter, the congressional redistricting bill passed on Second Reading by a voice vote, which was then followed by a vote to Suspend the Constitutional Rule (which requires an extraordinary or supermajority vote of three-fourths of the senate) by a vote of 26 Yeas, 5 Nays. The Constitutional Rule of having a bill lay over for three days having been suspended, the [congressional redistricting] bill was then approved on Third Reading by a vote of 18 Yeas, 13 Nays." App. 50a.

In 2001, the Texas Legislature was under split control: Republicans controlled the Texas Senate, but Democrats controlled the Texas House. Congressional redistricting bills did not reach the Senate floor in 2001 because 11 Senators announced that they would not support suspension of the

regular order of business. "At that time, the chair of the Senate Redistricting Committee (State Sen. Jeff Wentworth (R-San Antonio), was publicly quoted as stated that he would be unable to obtain the necessary two-thirds vote to bring a bill to the Senate Floor." App. 51a. The supermajority procedure used in the Texas Senate thus precluded consideration by the full Senate of any congressional redistricting legislation.

Since the State failed to draw new congressional districts after the 2000 census and 2001 congressional reapportionment, a three-judge federal court adopted a congressional map in 2001 and imposed it on the State of Texas. This Court summarily affirmed that judgment. *Balderas v. Texas*, 536 U.S. 919 (2002). The 2002 congressional elections were held under the court-drawn map. That same year, the Republicans won a majority of seats in the Texas House of Representatives and, with it, unified control of the state government.

In 2003, the Texas Legislature took the unprecedented step of replacing a perfectly lawful congressional districting plan after it had been used in one or more elections and before the next census. During the 2003 regular session, only the Texas House took up congressional redistricting, but the bill died when Democratic Representatives in the State House left the State and went to Ardmore, Oklahoma and successfully deprived the House of a quorum. Texas Governor Rick Perry called a special session, which began in June 2003. During that first special session, a blocker bill was once again placed atop the Senate calendar, as is the usual practice. During that first special session, eleven Senators, including nearly all the Appellants here, announced that they would not vote to suspend the rules to allow a

congressional redistricting bill to be taken up by the Texas Senate. Because a two-thirds supermajority vote was needed to suspend the rules of the Senate, congressional redistricting legislation died with the announcement. The supermajority requirement that had been utilized as a tradition in the Texas Senate once again served to block consideration of congressional redistricting legislation.

In the summer of 2003, however, Texas Governor Rick Perry called a second special session and Lieutenant Governor Dewhurst, the presiding officer of the Senate, announced that in the second special session, the supermajority procedure would be abandoned and that there would not be a blocker bill placed atop the Senate calendar. App. 15a. The decision to abandon the two-thirds rule was not broad-based; it specifically targeted only the rules governing the process for enacting *congressional redistricting* legislation.[3] App. 16a.

Appellants protested the State's decision to abandon the longstanding practice of require a supermajority prior to considering redistricting legislation by leaving the State of Texas in order to deprive the Senate of a quorum (which requires the presence of two-thirds of the senators). There they remained until the second special session ended.

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[3] Texas is among a distinct minority of states that has chosen to control its legislators' activities with rules requiring supermajorities. It takes two-thirds to form a legislative quorum. TEX. CONST. ART. III, § 10. It takes two-thirds to expel a member of the legislature. TEX. CONST. ART. III, § 11. It takes two-thirds to make a bill effective sooner than ninety days after adjournment of the session in which it is enacted. TEX. CONST. ART. III, § 39. It takes two-thirds to override a gubernatorial veto. TEX. CONST. ART. IV, § 14. And it takes four-fifths to suspend the rules requiring bills to be read on three separate days before passage. TEX. CONST. ART. III, § 32.

Eventually, however, a third session was called, a quorum was established, and congressional redistricting legislation was enacted using the simple majority procedure challenged here.

Approximately two months before that final vote occurred, appellants brought this action to enforce Section 5 of the Voting Rights Act, arguing that preclearance is required of a change in Senate procedures intended to make it possible for the Senate to enact a new redistricting plan.[4] Citing only *Presley v. Etowah County Commission*, 502 U.S. 491 (1992), the three-judge court below denied plaintiffs a Section 5 injunction and dismissed plaintiffs' Section 5 claims. The Court made no factual findings in its decision, ruling instead as a matter of law that the decision in *Presley* foreclosed any relief.

The appellants also challenged the abolition of the supermajority requirement under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and under the Fourteenth and Fifteenth Amendments to the United States Constitution, in the event either preclearance was not required of the change or if preclearance was required and obtained. The three-judge court dismissed those claims without affording appellants an evidentiary hearing.[5]

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[4] During the pendency of this case, the State, while preserving its argument that Section 5 did not apply, submitted the change at issue to the Justice Department for preclearance. The Justice Department responded that it did not consider the elimination of the two-thirds rule to be a covered change. So the change was never in fact precleared as non-retrogressive.

[5] Appellants believe the three-judge court's ruling dismissing their Section 2 and consitutional claims without even affording appellants the

THE QUESTIONS ARE SUBSTANTIAL

The three-judge district court's decision is contrary to decisions of this Court that have reversed three-judge courts that have attempted to carve out unwarranted exceptions to Section 5. The district court held that the change from a supermajority to simple majority practice or procedure was exempt from Section 5 preclearance requirements because it did not affect voters. It reasoned that "the process" by which a redistricting plan is enacted can never have the requisite effect on voting. As we show below, such a decision not only is inconsistent with this Court's Section 5 precedents but also "open[s] a loophole in the statute the size of a mountain[.]" *Morse v. Republican Party of Va.*, 517 U.S. 186, 235 (1996) (Breyer, J., concurring).

This Court has rendered numerous decisions over the last four decades on the scope of Section 5 coverage. *See, e.g., Young v. Fordice*, 520 U.S. 273 (1997) (voter registration system changes to comply with National Voter Registration Act (NVRA)); *Morse v. Republican Party of Va.*, 517 U.S. 186 (1996) (political party convention fees); *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 181 (1985) (change in candidate qualifying period); *City of Lockhart v. United States*, 460 U.S. 125 (1983) (numbered posts and staggered terms); *Dougherty County Bd. of Educ. v. White*, 439 U.S. 32, 42 (1978) (personnel rules affecting school district employees who desire to run for office); *Georgia v. United States*, 411 U.S. 526, 534 (1973) (redistricting plans); *Perkins v. Matthews*, 400 U.S. 379, 383-85 (1971) (annexations); and *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) (district to at-large voting

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right to an evidentiary hearing is so plainly wrong as a matter of law as to require summary reversal.

and change from elected school superintendent to appointed). In every case, with the exception of *Presley*, the Court has ruled in favor of coverage. This case should not become a second exception.

To the contrary, this case bears no resemblance to *Presley*, where the argument was that a change in the duties and authority of elected road commissioners affected the interests of those who had previously voted for them. This Court held that such a tangential link to voting – which would arise with every action affecting the power of any elected official – was outside the scope of Section 5. Here, however, the argument was that the change in Senate procedures would affect, *not* the voters who previously elected the Senate (as argued in *Presley*) but the voters who would be electing members of Congress in the future under a districting plan that was the intended and direct result of the abandonment of the two-thirds rule.

It should not be surprising that such a change in legislative procedures solely applicable to redistricting would need to be precleared. In fact, the uncontradicted record below demonstrated that numerous Section 5 covered jurisdictions over the years have routinely submitted for preclearance comparable changes in redistricting procedures. That only makes sense, given the well-established rule that redistricting plans themselves must be precleared and the reality, illustrated by this case, that changes in the procedures for adopting such plans can have huge consequences. *See* Exhibit 30, a 67-page computer printout from the Department of Justice listing redistricting procedures

submitted for preclearance by state and local governments from 1980-2003).[6]

I. THE DISTRICT COURT ERRED IN ITS INTERPRETATION OF *PRESLEY V. ETOWAH COUNTY COMM'N.*

Although the court below found that this Court's decision in *Presley v. Etowah County Commission*, 502 U.S. 491 (1992) "controls this case", the decision in *Presley*, is so utterly different as to be easily distinguishable. In *Presley*, plaintiffs challenged two resolutions of a county commission. One resolution transferred road supervision authority from the county commissioners to the county engineer. The other resolution transferred authority over road repairs from individual commissioners to the entire county commission. These resolutions were challenged under Section 5 of the Voting Rights Act on the theory that they diminished the authority of individual road commissioners and thus affected the nature of the elective office and the voters who had elected that official. This Court rejected that argument, holding that such changes did not have to undergo Section 5 preclearance because they had no connection to voting. The Court said: the change

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[6] The DOJ computer printout is in two parts, with Part 1 those changes from 1980 to 1991 and Part 2 from 1992 to 2003. The printout was attached as Exhibit B to Plaintiffs' Supplemental Memorandum in Opposition to Defendants' Motion to Dismiss. It lists hundreds of changes in redistricting practices and procedures that have been submitted to DOJ for preclearance over the last two decades. These changes include the elimination of a requirement that a redistricting ordinance be read on 3 separate days (page 18 in part 1), a change in redistricting criteria adopted by the State of Alabama (page 2 in part 1), and a limitation on the frequency with which city councils in South Carolina may adopt redistricing plans (page 35 in part 2).

"concerns only the internal operations of an elected body and the distribution of power among officials, and, thus, has no direct relation to, or impact on, voting." *Presley*, 502 U.S. at 492.

This case bears no resemblance to *Presley*. The argument here is that the Senate made an exception to its usual practices in enacting legislation, that that change greatly altered the ability of a 1/3 minority to affect the course of events, *and that the change was made applicable only to congressional redistricting*. The intent and effect was to break a log-jam in the Texas Senate on that issue, allowing the majority to pass a new map that would never win bipartisan support. The abandonment of the supermajority (2/3) Rule thus directly impacted voters and the redistricting practices and procedures in Texas.

The Court's decision in *Presley* did not undo the longstanding Section 5 principles that plainly would bring this change within the scope of those changes requiring preclearance. Its holding relating to internal governance changes concerning how county road funds are to be administered is not a conclusion banishing all internal governance changes from Section 5's purview. Just because *Presley* held one type of internal change to be outside Section 5 does not mean that it can be extended to exempt *all* types of internal governance changes from Section 5's requirements. *Presley* addressed and set an outer limit for Section 5. It did not overturn any earlier decisions establishing what clearly fell within that outer limit.

No matter how closely or how broadly *Presley* is read, it cannot in any way be read to hold that a change as directly linked to voting – through both logic and reality – as the one at issue here is outside Section 5's reach. *That* reading of

Presley would be at odds with this Court's direction since inception of the Voting Rights Act that "§ 5 is to be given broad scope." *NAACP v. Hampton County Election Comm'n*, 470 U.S. at 176. It would also exempt from Section 5 scrutiny changes only applicable to redistricting that are aimed at making minority voters worse off than they were before, the essence of what Section 5 is designed to prevent. *See Georgia v. Ashcroft*, 123 S. Ct. 2498 (2003).

The three-judge court below held that *Presley* barred relief here because the events that gave rise to this case "affect the distribution of power between legislators of two different parties." App. 2a. But allocations of political power are subject to Section 5 as this Court held in *Foreman v. Dallas County*, 521 U.S. 979 (1997) (per curiam). In *Foreman, supra*, "a three-judge court held that preclearance was not required because the county was simply exercising, under the state statute, its "discretion to adjust [the procedure for appointing election] judges according to party power." 521 U.S. at 980 (alteration in original) The three-judge court in *Foreman*, this Court found, "had apparently concluded that this 'discretionary' use of political power meant that the various methods for selecting election judges were not covered changes under § 5." *Id.* The Court held that the lower court's decision was inconsistent with this Court's Section 5 precedents. "The fact that the county's new procedures used political party affiliation as the selection criterion does not mean that the methods were exempt from preclearance." *Id.* at 981.

Foreman was decided after *Presley* and thus makes clear that *Presley* did not carve out any Section 5 exceptions merely because a State or political subdivision altered some voting or election procedure "according to [political] power." 521 U.S. at 980. Similarly, the three-judge court's

decision in this case that Section 5 preclearance was not required because the abolition of the supermajority practice or procedure only "affect[ed] the distribution of power between legislators of two different political parties" is unwarranted.

II. A CHANGE IN THE CONSISTENTLY APPLIED PRACTICE OR PROCEDURE FROM A SUPERMAJORITY RULE TO A SIMPLE A MAJORITY PROCEDURE IN THE TEXAS SENATE — APPLICABLE ONLY TO CONGRESSIONAL REDISTRICTING — REQUIRES SECTION 5 PRECLEARANCE

The question here is whether the change in procedures from using supermajority rules to ones using only a simple majority, targeted solely to congressional redistricting legislation, is subject to the preclearance requirements of the Voting Rights Act. To see why it is, it is helpful to shift from a focus on informal, internal rules of the legislative body. Instead, consider an analogous action taken through formal constitutional or legislative amendment. Assume, for example, that the legislature, at the Lieutenant Governor's urging, approved the holding of a statewide referendum on whether to amend Article III, § 10, of the Texas Constitution[7] by adding the following as an exception after the opening phrase "Two-thirds of each House shall constitute a quorum to do business . . .": *except in consideration of legislation concerning congressional redistricting, in which case a*

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[7] It now reads: "Two-thirds of each House shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and compel the attendance of absent members, in such manner and under such penalties as each House may provide." TEX. CONST. ART. III, § 10.

simple majority shall constitute a quorum to do business. Were the people of Texas to add that new provision to the Texas Constitution, it seems clear that the new constitutional rule would be a change in state procedures affecting voting that could not be implemented until the State had obtained Section 5 preclearance under the Voting Rights Act.

Or consider another hypothetical situation, admittedly outlandish in this day and time but not too far from the core concerns animating the Voting Rights Act when it first was passed in 1965. Assume the legislature were to enact a statute providing that, on votes concerning congressional redistricting legislation, the votes of minority members of the Texas Senate shall not be counted if counting them would block passage of the bill by two-thirds of the legislature. Surely Section 5 would bar implementation of such a statute – whose practical effect would be intended, among other things, to hasten the effective date of state legislation – pending preclearance.[8]

In Texas, redistricting is not just a simple one-time act that takes place when a bill is passed in the Legislature. Rather, the State has made the decision that it will involve a process that shapes the bill and determines how the lines will ultimately be drawn. Changes to that redistricting process, such as whether minorities and their elected representatives in the Texas Senate can force compromise or consensus on a redistricting bill—as the supermajority rule is intended to allow—are a potent procedural weapon. That the redistricting plan itself will ultimately be subject to Section 5

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[8] The broader constitutional defects in such a statute under the Fourteenth Amendment's Equal Protection Clause and the Fifteenth Amendment would not even have to be reached in light of the statutory protection afforded by Section 5.

preclearance is some protection, to be sure. But a plan may be unobjectionable under the Voting Rights Act and nonetheless impact voters in ways they would like to avoid or change, such as dividing their communities of interest or placing their community in a different congressional district. The process of redistricting allows them to pursue such changes and thus the process by which redistricting plans are enacted should not be exempt from Section 5.

Redistricting is a process by which state officials alter voting constituencies and impact the voters' ability to elect candidates of their choice to office. The redistricting process involves voting because it inevitably affects the ability of voters to cast ballots, as well as the opportunity for them and their elected representative to express their views on the configuration of the districts. *See Georgia v. United States*, 411 U.S. 526 (1973). Where a redistricting practice or procedure has been in place for many years, changes to it directly impact voters' abilities to affect the congressional districts in any redistricting plan that is being considered or which may eventually pass the Senate. And a procedural protection of a supermajority practice or procedure is vitally important to maintaining the integrity of the redistricting process and insuring that minorities (racial or political) can protect their interests and play an effective role in the political process. Ultimately, changes to redistricting practices and procedures, occasioned here by the change from the supermajority (2/3) practice to a simple majority, affect voters' ability to shape the contours of any new map, and their ability to participate effectively in the political process.

In addition, changes in redistricting procedures affect officeholders' abilities to effectuate changes in voting

constituencies, which in turn can affect the ability of candidates to become or remain holders of elective office. *See Dougherty County Board of Education v. White*, 439 U.S. 32 (1978) (requiring preclearance of change in absenteeism policy that forced employees to take unpaid leave if they ran for office); *see also* 28 C.F.R. § 51.13(g) (Regulations of the United States Department of Justice Under Section 5 of the Voting Rights Act listing the ability to become or remain holders of elective office as examples of covered changes). Because sponsors of redistricting legislation in the Texas House and Senate in 2003 made clear that the aim of their redistricting legislation was to replace Democratic officeholders with Republicans, changes in redistricting procedures will have a profound effect on the ability of candidates "to become or remain holders of elective office" and will thus affect voters' choices.

The Voting Rights Act defines "vote" and "voting" to include "all action necessary to make a vote effective." 42 U.S.C. § 1973*l*(c)(1). The plain language of the statute makes the preclearance requirements applicable to any change with respect to voting, no matter how small or minor. *See Allen*, 393 U.S. at 566-68 ("It is significant that Congress chose not to include even . . . minor exceptions to § 5, thus indicating an intention that all changes, no matter how small, be subjected to § 5 scrutiny."). The language "voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting" (42 U.S.C. § 1973c) includes all procedural rules affecting the casting of a ballot. *Allen*, 393 U.S. at 565-67.

The changes in the practices and procedures followed by the Texas Senate aimed specifically and solely at congressional redistricting legislation will affect voters and thus fall within the scope of Section 5.

III. THAT THE *FORM* OF THE VOTING CHANGE AT ISSUE HERE IS ONE INVOLVING AN INTERNAL RULE, RATHER THAN FORMAL LEGISLATION, IS LEGALLY IRRELEVANT.

The fact that the change at issue here involved internal Senate rules rather than publicly debated and adopted legislation or constitutional amendment does not affect the Section 5 analysis. "[T]he form of a change in voting procedure cannot determine whether it is within the scope of § 5." *NAACP v. Hampton County Election Comm'n*, 470 U.S. at 178. *Any* change "reflecting the policy choices of the elected representatives of the people" is subject to Section 5's requirements. *McDaniel v. Sanchez*, 452 U.S. 130, 153 (1981). Just as rules and decisions of the judicial branch are not beyond Section 5's reach, *Hathorn v. Lovorn*, 457 U.S. 255, 265 n.16 (1982), neither are the internal rules of the Senate when they affect voting. Changes that "affect even a single election" are covered. *NAACP v. Hampton County Election Comm'n*, 470 U.S. at 178.

The backdrop for these rules on Section 5's reach is Congress's intention to reach the "protean strategies of racial discrimination." *Dougherty County Board of Education v. White*, 439 U.S. 32, 37 n.6 (1978). *Dougherty* even extended Section 5 to require preclearance of a local government's change in leave policy for employees wishing to run for public office. This and similar decisions make it clear that realism, not formalism, is to govern interpretation of Section 5. "Section 5 is not concerned with a simple inventory of voting procedures, but rather with *the reality of changed practices* as they affect" minority voters. *Georgia v. United States*, 411 U.S. 526, 531 (1973) (emphasis added).

The reality of the Senate rule change at issue here is plain. Its sole intention, and its only effect, is enactment of a congressional redistricting plan disfavored by those targeted by the rule change. Effectuation of the rule change is tantamount to a direction that a new, judicially unforced, mid-decade congressional redistricting plan be passed in Texas. Treatment of such a change cannot be artificially segregated from its consequences – which are indisputably covered by Section. 5.[9]

In *NAACP v. Hampton County Election Commission*, the Court rejected this kind of artificial separation, holding that a change in candidate filing periods is covered by Section 5, and explaining that "a filing period cannot be considered in isolation from the election of which it forms a part." 470 U.S. at 177. Here, there is a direct link between the targeted suspension of the two-thirds rule and "the election of which it forms a part."

This Court has indicated that one measure of whether a matter is covered by Section 5 is the "actual practice" of the covered states. *Georgia v. United States*, 411 U.S. at 533. Attached as Exhibit B is a lengthy print-out of Section 5 submissions to the Department of Justice, depicting the longstanding and extensively honored practice of submitting for Section 5 preclearance changes in procedures related to redistricting matters, a number of which involved changes to internal governance rules.

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[9] *See Georgia v. United States*, 411 U.S. 526 (1973) (congressional redistricting legislation subject to Section 5).

CONCLUSION

This Court should summarily reverse the decision of the district court. Alternatively, this Court should note probable jurisdiction.

Respectfully submitted.

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APPENDICES

Appendix A

United States District Court,
S.D. Texas, Laredo Division.

Gonzalo BARRIENTOS, et al., Plaintiffs,
v.
STATE of Texas, et al., Defendants.

No. Civ.A. L-03-113.

Sept. 12, 2003.

MEMORANDUM AND ORDER

This action was brought by eleven Texas State Senators against: the State of Texas, its Governor, and Lieutenant Governor, seeking declaratory and injunctive relief under §§ 2 and 5 of the Voting Rights Act ("the Act"). The complaint primarily attacks two events: first, the decision by the state legislature to consider congressional redistricting legislation this year, notwithstanding that a redistricting plan has already been implemented this decade; second, the declaration by the Lieutenant Governor that redistricting legislation would be considered in a special session without adhering to the so-called "2/3rd Rule." Plaintiffs allege that these two events constitute changes affecting voting within the meaning of the Act and, therefore, are legally unenforceable because preclearance has not been obtained.

Defendants have filed a motion to dismiss, arguing that the Act does not apply to either of the challenged events. We agree.

The United States Supreme Court decision in *Presley v. Etowah County Commission, et al.*, 502 U.S. 491, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992), controls this case. *Presley* makes clear that, while the reach of the Act is broad, it is nevertheless still "an extraordinary departure from the traditional course of relations between the States and the Federal Government," *id.* at 827, and that its reach is limited to procedures that have "a direct relation to voting and the election process." *id.* at 829. Thus, the Act is concerned with changes affecting procedures for casting ballots, candidacy requirements and qualifications, and composition of the electorate. *Id.* at 828. *Presley* distinguished between changes directly affecting voting by the electorate and "changes in the routine organization and functioning of government." *Id.* at 829. While the latter may indirectly affect voting, they are not within the scope of the Act.

We readily acknowledge, as did the Supreme Court, that "in a real sense every decision taken by government implicates voting," which is "but the felicitous consequence of democracy, in which power derives from the people." *Presley,* 112 S.Ct. at 829. Nevertheless, the Supreme Court insisted that a line must be drawn between events which directly affect the voters and events which, as here, affect the distribution of power between legislators of two different political parties. In the instant case, what will directly affect the voters of this State is a redistricting bill, not the mere consideration of such a bill or the process by which it comes to the floor of the Texas Senate. The Department of Justice has also concluded that the consideration by the Texas legislature of a redistricting bill without applying the "2/3rd

Rule" is not a change affecting voting within the contemplation of the Act. This conclusion, while not binding upon us, is entitled to "considerable deference." *Id.* at 831.

It is undisputed that any new redistricting bill would have a direct relation to voting. Accordingly, it would have to be precleared under the Act and would thereafter be subject to judicial challenge. However, that time has not yet come.

The motion to dismiss claims under the Voting Rights Act is GRANTED. We also DISMISS claims under *42 U.S.C. § 1983*, insofar as Plaintiffs claim that the State's decision to consider redistricting legislation and the failure to adhere to the "2/3rd Rule" violate the First, Fourteenth and Fifteenth Amendments to the United States Constitution.

We have promptly issued this brief opinion because of our understanding that another special session of the Texas legislature is imminent. We reserve the opportunity to issue a more detailed opinion hereafter, if appropriate. We also withhold ruling on Plaintiffs' motion to file a first amended complaint. The purpose of the amendment is to add a Count V, complaining of threats to arrest the Plaintiffs and also to require that they pay a monetary sanction for their failure to appear at earlier special sessions. As discussed at the hearing on September 11, 2003, the arrest issue likely will become moot. Indeed, the Plaintiffs' fear of being coerced to appear at a legislative session is shifting to a fear of being prevented from appearing. For reasons discussed at the hearing, neither the facts nor the law on the issue of threatened monetary sanctions are sufficiently developed at this point to permit an informed decision. Moreover, it is possible that future developments could also moot this issue.

DONE this 12th day of September, 2003

U.S. Circuit Judge Patrick E. Higginbotham
Chief U.S. District Judge George P. Kazen
U.S. District Judge Lee H. Rosenthal

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

GONZALO BARRIENTOS,)
RODNEY ELLIS, MARIO GALLEGOS, JR.,)
JUAN "CHUY" HINOJOSA, EDDIE LUCIO, JR.,)
FRANK L. MADLA, ELIOT SHAPLEIGH,)
LETICIA VAN DE PUTTE, ROYCE WEST,)
JOHN WHITMIRE, and JUDITH ZAFFIRINI,)
)
Plaintiffs,)
)
v.)
)
STATE OF TEXAS,)
RICK PERRY, In His Official Capacity)
As Governor of the State of Texas;)
DAVID DEWHURST, In His Official Capacity)
As Lieutenant Governor and Presiding Officer)
Of the Texas Senate,)
)
Defendants.)

September, 22, 2003

NOTICE OF APPEAL

Plaintiffs Gonzalo Barrientos, Rodney Ellis, Mario Gallegos, Juan "Chuy" Hinojosa, Eddie Lucio, Frank Madla, Eliot Shapleigh, Leticia Van de Putte, Royce West, John Whitmire, and Judith Zaffirini hereby appeal to the United States Supreme Court this Court's September 12, 2003, Memorandum and Order.

Respectfully submitted,

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Appendix C

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

GONZALO BARRIENTOS,
RODNEY ELLIS, MARIO GALLEGOS, JR.,
JUAN "CHUY" HINOJOSA, EDDIE LUCIO, JR.,
FRANK L. MADLA, ELIOT SHAPLEIGH,
LETICIA VAN DE PUTTE, ROYCE WEST,
JOHN WHITMIRE, and JUDITH ZAFFIRINI,

Plaintiffs,

v.

STATE OF TEXAS,
RICK PERRY, In His Official Capacity
As Governor Of The State of Texas; and
DAVID DEWHURST, In His Official Capacity
As Lieutenant Governor and Presiding Officer
Of the Texas Senate,

Defendants.

August 11, 2003

COMPLAINT

Plaintiffs allege that:

1. This action is brought pursuant to Sections 2, 5 and 12(d) of the Voting Rights Act of 1965, as amended,

42 U.S.C. §1973, 42 U.S.C. §1973c, 42 U.S.C. §1973j(d), and pursuant to 42 U.S.C. §1983, to enforce rights guaranteed by the United States Constitution.

2. This Court has jurisdiction of this action pursuant to 28 U.S.C. §§1331, 1343, 1344, 2201, and 2202. This Court also has jurisdiction pursuant to 42 U.S.C. §§1973c, 1973j(d), and 1973j(f).

3. Plaintiffs are duly elected members of the Texas Senate. Plaintiff Barrientos is Hispanic and resides in Travis County. Plaintiff Ellis is African-American. Plaintiff Gallegos is Hispanic. Plaintiff Whitmire is Anglo. Plaintiffs Ellis, Gallegos and Whitmire reside in Harris County. Plaintiff Hinojosa is Hispanic and resides in Hidalgo County. Plaintiff Lucio is Hispanic and resides in Cameron County. Plaintiffs Madla and Van de Putte are Hispanic and reside in Bexar County. Plaintiff Shapleigh is Anglo and resides in El Paso County. Plaintiff West is African-American and resides in Dallas County. Plaintiff Zaffirini is Hispanic and resides in Webb County. Plaintiffs bring this case as individual voters and in their official capacities as duly elected members of the Texas State Senate.

4. Plaintiffs represent the eleven state senate districts in Texas with the highest number of minority voters of any of the 31 state senate districts. Ten of the eleven state senate districts represented by plaintiffs are majority-minority in total population, and the eleventh, represented by Senator Barrientos, is approximately 45% minority in total population.

5. The defendant State of Texas is a state of the United States of America.

6. The defendant State of Texas is subject to the provisions of Section 5 of the Voting Rights Act, 42 U.S.C. §1973c.

7. Defendant Governor Rick Perry is the duly elected Governor of the State of Texas and the chief executive officer of the State. Defendant Perry is sued in his official capacity.

8. Defendant David Dewhurst is the duly elected Lieutenant Governor of the State of Texas and is the presiding officer of the Texas Senate. Defendant Dewhurst is sued in his official capacity.

9. Section 5 of the Voting Rights Act provides that any "voting qualification, or prerequisite to voting, or standard, practice or procedure with respect to voting" different from that in force or effect in the State of Texas, on November 1, 1972, may not be lawfully implemented unless the State of Texas obtains a declaratory judgment from the United States District Court for the District of Columbia that the change affecting voting does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, except that the change may be implemented without such judgment if it has been submitted to the Attorney General of the United States and no objection has been interposed by the Attorney General within sixty days. See 42 U.S.C. §1973c.

10. The defendants have authority under Texas law to enact or administer "voting qualifications, or prerequisites to voting, or standards, practices or procedures

with respect to voting," (42 U.S.C. §1973c) different from those in force or effect on November 1, 1972.

FACTS

Procedural History

11. Since November 1, 1972, the coverage date of the special provisions of the Voting Rights Act, the State of Texas has gone through three congressional redistricting cycles following the release of the decennial census.

12. In the redistricting cycles following release of the 1980 and 1990 census, the State of Texas followed certain practices and procedures with respect to enacting a new congressional map. In the post-1980 and post-1990 cycles, for example, the State of Texas declined to exercise its discretion to undertake congressional redistricting once a valid congressional map was implemented that met all legal requirements. Indeed, in 1996, a federal court struck down Texas' congressional map, imposed a map of its own, and ordered the Texas Legislature to enact a new map in the 1997 legislative session. Even in those circumstances, the Texas Legislature declined to exercise its discretion to redistrict and the court-ordered plan remained in effect for the 1998 and 2000 elections.

13. In the 1981, and 1991, and 2001 redistricting cycles, the State of Texas conducted numerous public hearings across the State to give voters and other members of the general public an opportunity to participate in the political process that would lead to the formation of new voting constituencies as a result of redistricting. In connection with the 2001 cycle, for example, the full

redistricting committees of the Texas House and the Texas Senate conducted public field hearings on redistricting jointly in the following cities: Abilene, Arlington, Austin, Dallas, El Paso, Tyler, Houston, Harlegen, Midland, Houston, and San Antonio.

14. Prior to 2003, the redistricting process followed by the State of Texas involved the full Redistricting Committees of the House and Senate conducting joint field hearings across the State. The redistricting practices and procedures used to conduct redistricting hearings in the State of Texas prior to 2003, by having all Members of the Senate and House Redistricting Committee to conduct hearings together, permitted each and every member of the House and Senate redistricting committees to hear all of the testimony from all of the witnesses. The process of conducting joint hearings also permitted all members of the House redistricting committee to hear the testimony presented to the Senate redistricting committee and vice versa.

15. In its 2001 regular session, the Texas Legislature failed to enact a congressional redistricting map. In July 2001, the Governor of Texas announced that he would not call a special session of the Legislature because to do so would be a waste of taxpayer dollars. He further announced that as a result of his decision, the issue of congressional redistricting would be resolved by the courts and not by the Legislature.

16. In November 2001, a three-judge federal court imposed a congressional plan for the State of Texas. *Balderas v. State of Texas*, No. 6:01CV158 (E.D. Tex., November 14, 2001). The three-judge court's plan was not an interim one, imposed for the 2002 elections only. Instead,

the three-judge court stated that the map being imposed would be "*the* remedial congressional redistricting plan for the State of Texas." *Id.* (emphasis added). The judgment imposing a court-drawn map in *Balderas* neither ordered the State of Texas to enact a new congressional map nor did it encourage the State legislature to do so.

17. Although the *Balderas* plaintiffs appealed the decision of the three-judge court to the United States Supreme Court, the State of Texas did not appeal. Instead, the State of Texas filed a motion to dismiss or affirm the three-judge court's decision. On June 17, 2002, the United States Supreme Court summarily affirmed the decision of the three-judge court. See *Balderas v. State of Texas*, 536 U.S. 919 (2002). The three-judge court's congressional map governed the 2002 elections. There has been no finding or determination that the *Balderas* three-judge court's map is unconstitutional or unlawful in any way. Nor have any census data been released which show the districts ordered into effect by the three-judge court in *Balderas* to be malapportioned. Indeed, the Texas Attorney General has opined that the State of Texas need not redistrict its congressional districts at this time, and that the *Balderas* map could remain in effect for the entire decade. See Texas Attorney General Opinion No. GA-0063 April 23, 2003.

The 2003 Redistricting Efforts

18. During the 2003 regular session of the Texas Legislature, the Texas House proceeded with an effort to enact a new congressional map, but the Texas Senate did not take up the issue. The efforts of the Texas House were thwarted, however, when certain members of the Texas House broke quorum, precluding the House from taking up

the congressional redistricting bill in the regular session. The 2003 regular session, therefore, ended without any congressional redistricting bill being passed.

19. On June 18, 2003, Texas Governor Rick Perry announced that a special session of the Texas Legislature would be convened for the purpose of enacting a new congressional map. The House promptly proceeded to enact a new congressional map. However, the Texas Senate attempted, but failed, to pass a new congressional map in the special session because of a long-standing practice of the Texas Senate that requires a 2/3 majority of those in the Senate to agree to take up a congressional redistricting bill (hereafter the "2/3 Rule").[1]

20. The State of Texas' decision to undertake congressional redistricting in 2003, despite the fact that it is operating under a legal plan ordered into effect for the decade by a three-judge federal court and affirmed on direct appeal by the United States Supreme Court, is unprecedented.

21. Moreover, the manner in which the State has proceeded with its redistricting efforts in 2003 substantially

---

[1] In the Senate, a 2/3 vote is ordinarily necessary to take up a bill out of order. Consequently, it has been the practice in the Texas Senate for a Member to file a bill, known as "a blocker bill", as the first piece of legislation in the session. The presence of a blocker bill has the effect of requiring 2/3 of the Senate to vote to take up a bill out of order and to consider it ahead of the blocker bill. In the 31 Member Senate, eleven Senators can effectively prevent a bill from reaching the floor as a result of the 2/3 Rule. On July 14, 2003, Republican Senator Bill Ratliff announced that he would join with at least 10 other Democrats to prevent congressional redistricting from reaching the Senate floor. See Exhibit 12, hereto.

departs from the normal procedural sequence it has followed historically. For instance, the Senate and House have failed to conduct *joint* redistricting hearings as had occurred in prior redistricting cycles. Instead, the House and Senate each conducted separate field hearings. Thus, the testimony of hundreds of witnesses who attended and testified at the House field hearings was never heard or considered by the Senate members, and the testimony of hundreds of witnesses who attended the Senate hearings was not heard or considered by House members.

22. The number of hearings, the location of the hearings and the organization of the hearings has also been a substantial departure from prior redistricting efforts. For instance, the House Redistricting Committee refused to approve a motion made to conduct field hearings during the regular session. House Redistricting Committee Chairman Joe Crabb also questioned the value of holding public field hearings on redistricting in South Texas where most persons spoke Spanish, stating that since only a few Committee members spoke Spanish, most members of the Committee would be unable to understand what non-English speaking witnesses would be saying. Moreover, although the full fifteen-member House Redistricting Committee included two African American members and four Hispanics, not a single subcommittee was chaired by a minority group representative. In addition, the Committee failed to conduct any official field hearings in the Rio Grande Valley or in any city south of San Antonio. While the Committee attempted to hold an "unofficial" subcommittee hearing in Brownsville, those in attendance, primarily Hispanics, would not allow the meeting to proceed because the subcommittee lacked a quorum and the citizens there demanded an official hearing.

23. In addition to no longer holding joint hearings with the House, the Senate failed to conduct any field hearings in either far West Texas or East Texas. Thus, the Senate held no redistricting field hearings in El Paso or Tyler, two cities where the Senate had traveled to conduct redistricting field hearings in 2000.

24. Finally, the testimony of the public was largely ignored. In the House field hearings, for example, 96.5% of the 3103 persons who attended those hearings registered an opinion against the Texas Legislature undertaking any redistricting. On the Senate side, 92.1% of the 2982 the persons who registered a position on redistricting registered an opinion against redistricting. Over 6000 Texans attended these hearings in June and July of 2003. In spite of this widespread and overwhelming opposition to the State of Texas taking up congressional redistricting, the House and Senate Committees each proceeded to undertake redistricting anyway and passed new congressional maps. However, as noted above, congressional redistricting legislation never reached the full Senate because a third of the Senators invoked the Senate's traditional 2/3 Rule. See page 6, note 1, *supra.*

The 2003 Second Special Session

25. Governor Rick Perry has now issued a proclamation calling a second special session for the purpose of considering congressional redistricting. Lieutenant Governor Dewhurst publicly announced that in the second special session, the extraordinary majority practice or procedure known as the 2/3 Rule, a long-standing practice of the Texas Senate that empowers the chamber's minority by requiring a 2/3 vote to open debate, will not be in effect. The

defendants' decision to abandon the 2/3 Rule only applies to congressional redistricting legislation in the second called special session, and not to any other pieces of legislation that might come before the Senate.

26. There are 31 members of the Texas Senate; twelve Democrats (of which nine are minority) and nineteen Republicans (of which none are minority). If the 2/3 Rule is in place, any 11 members of the Texas Senate (35%) can join together and block a redistricting bill from being considered. The eleven plaintiffs-Senators who have brought this action wish to avail themselves of the protections of the 2/3 Rule, which has been available to other Senators in prior sessions when congressional redistricting legislation was considered.

27. The 2/3 Rule is a traditional practice or procedure of the Texas Senate that protects a minority group: racial, political or otherwise. There are nine minority group members of the Texas Senate, and all nine are Democrats. These nine Senators are among the eleven plaintiffs who have brought this action, and they have stated publicly that they are opposed to congressional redistricting being considered by the Texas Senate. The other two plaintiffs-Senators (Shapleigh and Whitmire) are Anglo Democrats who also represent majority-minority districts. These eleven plaintiffs have left the State and their absence has deprived the Texas Senate of a quorum. These 11 Senators have executed sworn Declarations stating that their constituents' interests will be harmed if the protections of the 2/3 Rule are not available in any special sessions in 2003 or 2004. See Exhibits 1-11 hereto. These 11 Senators have also stated that the defendants' decision to abandon the 2/3 Rule is intended to have, and will in fact have, a discriminatory result on

minority voters and officeholders on account of their race, color, or membership in a language minority group. *Ibid.*

28. If these eleven Senators could avail themselves of the protections afforded by the 2/3 Rule, minority voters and their elected Senators would be able to use the practice or procedure that other Anglo Senators have had the opportunity to use in the past to protect them and their constituents from the harmful effects of a new congressional plan. If the traditional practice or procedure of using the supermajority (2/3) Rule protections is in place, a simple majority of Senators would be insufficient to bring up congressional redistricting legislation. Changing or abandoning the traditional practice or procedure of a supermajority (2/3) Rule will mean that these Senators do not have the protection of a practice or procedure used in the past by Anglo Senators to require consensus, compromise and negotiation in considering any congressional redistricting legislation. Changing or abandoning the supermajority (2/3) Rule will render ineffective the representation that these Senators can provide to their constituents on congressional redistricting legislation.

29. In prior sessions the Texas Legislature has considered congressional redistricting in nine regular and special sessions since 1971: the 1971 regular session; the 1981 regular session; the 1981 special session; the 1991 regular session; the 1991 special session; the 1997 regular session; the 2001 regular session; the 2003 regular session; and the first 2003 special session. In all but one of these instances (1981), a supermajority rule has been utilized and respected whenever the Texas Senate has considered congressional redistricting. The decision to do away with a 2/3 Rule in 2003 will harm minority voters and the ability of

their elected representatives to protect their voting rights in the congressional redistricting process. As a result of the State's decision to abandon its traditional practices and procedures of having a supermajority 2/3 Rule for congressional redistricting, the nine black and Hispanic plaintiffs-Senators, as well as their constituents, are being deprived of the protections that the 2/3 Rule has afforded other legislators in prior sessions when congressional redistricting was being considered. As a result of the State's decision to abandon its traditional practices and procedures of having a supermajority 2/3 Rule for congressional redistricting, the minority voters in the two majority-minority state senate districts represented by Anglo Senators Shapleigh and Whitmore, also will be deprived of the protections that the 2/3 Rule has afforded other Senators in prior sessions when congressional redistricting was being considered.

COUNT I

30. By changing its redistricting practices and procedures, and no longer permitting members of the Texas Senate to avail themselves of the protections afforded by the 2/3 Rule, the defendants are seeking to enact or administer a new voting "standard, practice or procedure" within the meaning of Section 5 of the Voting Rights Act, 42 U.S.C. §1973c.

31. Changes in redistricting practices or procedures, such as the abandonment of a supermajority requirement as a prerequisite to considering congressional redistricting legislation, are subject to the preclearance requirements of Section 5. Such changes directly impact voters' abilities to affect the congressional districts in any

redistricting plan that is considered or which may eventually pass the Senate. Changes in redistricting procedures thus effectuate changes in voting constituencies, which in turn can affect the ability of candidates "to become or remain holders of elective office." 28 C.F.R. 51.13(g)(Regulations of the United States Department of Justice Under Section 5 of the Voting Rights Act Listing Examples of Covered Changes). Because sponsors of redistricting legislation in the Texas House and Senate in 2003 have made clear that the aim of their redistricting legislation is to replace Democratic officeholders with Republicans, changes in redistricting procedures will have a profound effect on the ability of candidates "to become or remain holders of elective office."

32. The changes in redistricting procedures here, the unprecedented mid-decade redistricting when a legally valid map is in place, as well as the abandonment of the supermajority (2/3) Rule, will also bear on the ability of the 11 plaintiffs-Senators and the voters in their districts to participate effectively in the political process. Changes that affect the ability of voters to participate effectively in the political process are subject to Section 5. See *Morse v. Republican Party of Virginia,* 517 U.S. 186, (1996), 116 S. Ct. 1186, 1200-1201.

33. By the unprecedented use of special sessions to redistrict in the absence of (A) new census data showing blatant violations of one-person, one-vote in the current plan, or (B) any court order finding the current plan is either unconstitutional or illegal, the defendants are seeking to enact or administer a new voting "standard, practice or procedure" within the meaning of Section 5 of the Voting Rights Act, 42 U.S.C. §1973c.

34. The defendants have not obtained the requisite preclearance of the voting changes identified in paragraphs 25-33, above, from the Attorney General of the United States, pursuant to Section 5 of the Voting Rights Act, as amended, 42 U.S.C. §1973c.

35. No judgment has been obtained from the United States District Court for the District of Columbia pursuant to Section 5 of the Voting Rights Act, as amended, 42 U.S.C. §1973c, declaring that the voting changes identified in paragraphs 25 through 33, above, have neither the purpose nor the effect of denying or abridging the right to vote on account of race or color.

36. The failure of the defendants to obtain the preclearance required by Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973c, as described in the preceding paragraphs, renders the voting changes identified in paragraphs 25-33, above, legally unenforceable unless and until preclearance is obtained.

COUNT II

37. Plaintiffs reallege the factual allegations set forth in paragraphs 9 through 29, *supra*.

38. The defendants' decision to abandon the 2/3 Rule will harm minority voters and the ability of their elected representatives to protect their voting rights in the congressional redistricting process. As a result of the State's decision to abandon its traditional practices and procedures of the 2/3 Rule, the black and Hispanic Senators, as well as their constituents, are being deprived of the protections that the 2/3 Rule has afforded other legislators in prior sessions

when congressional redistricting is being considered. The decision to abandon the 2/3 Rule will result in discrimination on account of race, color, or membership in a language minority group in violation of Section 2 of the Voting Rights Act, 42 U.S.C. §1973.

COUNT III

39. Plaintiffs reallege the factual allegations set forth in paragraphs 9 through 29, *supra.*

40. The defendants' decision to abandon the 2/3 Rule is aimed at a protected class of persons, minority voters and their elected Senators, in violation of 42 U.S.C. §1983, and the Fourteenth and Fifteenth Amendments to the United States Constitution. The defendants' decision to abandon the 2/3 Rule is motivated by a racially discriminatory purpose and will have a racially discriminatory effect in violation of 42 U.S.C. §1983, and the Fourteenth and Fifteenth Amendments to the United States Constitution.

COUNT IV

41. Plaintiffs reallege the factual allegations set forth in paragraphs 9 through 29, *supra.*

42. On August 7, 2003, defendants Perry and Dewhurst filed a petition in the Supreme Court of Texas. The extraordinary and unprecedented action of defendants Perry and Dewhurst seeks an Order from the state's highest court forcing the 11 Senators-plaintiffs to return from Texas and to attend the current special session. Never in the history of the State have state officeholders taken such actions against any Senators who either broke quorum or

otherwise failed to attend any legislative session or portion thereof. Forcing these Senators to return to the State will harm the representational interests of these plaintiffs-Senators and their constituents. By their presence in New Mexico, these plaintiffs-Senators are exercising their First Amendment rights of political speech and are providing their constituents, who are overwhelmingly opposed to congressional redistricting, with effective representation on this issue. Forcing these Senators to come back to Texas without the protections of the 2/3 Rule will result in the enactment of a new congressional map, which is contrary to the views and interests held by these plaintiffs-Senators and their constituents. Forcing these Senators to return to Texas and thereby enable a congressional redistricting bill to pass the Senate without the protections of the traditional 2/3 Rule is tantamount to forcing these Senators to violate the representational interests of their constituents, in violation of the First, Fourteenth and Fifteenth Amendments to the United State Constitution.

43. Defendants Perry and Dewhurst's actions are aimed at a protected class of persons, minority voters and their elected Senators, in violation of 42 U.S.C. §1983, and the First, Fourteenth and Fifteenth Amendments to the United States Constitution. Defendants Perry and Dewhurst's actions to use the judicial machinery of the State of Texas to solve a political and legislative problem is motivated by a racially discriminatory purpose and will have a racially discriminatory effect in violation of 42 U.S.C. §1983, and the First, Fourteenth, and Fifteenth Amendments to the United States Constitution.

WHEREFORE, plaintiffs pray that a court of three judges be convened pursuant to 42 U.S.C. §1973c and 28 U.S.C. §2284, and thereafter issue a judgment:

(1) Declaring that the State of Texas's decision to undertake congressional redistricting in 2003, despite the fact that it is operating under a legal plan ordered into effect for the decade by a three-judge federal court and affirmed on direct appeal by the United States Supreme Court, constitutes a change affecting voting within the meaning of Section 5 of the Voting Rights Act, as amended, 42 U.S.C. §1973c, and is legally unenforceable because the voting change has not received the requisite Section 5 preclearance;

(2) Declaring that the State of Texas's unprecedented decision to abandon the 2/3 Rule for congressional redistricting constitutes a change affecting voting within the meaning of Section 5 of the Voting Rights Act, as amended, 42 U.S.C. §1973c, and is legally unenforceable because the voting change has not received the requisite Section 5 preclearance;

(3) Declaring that the State's decision to abandon the 2/3 Rule for congressional redistricting in any special session, thereby depriving minority group Senators from utilizing the protections of the 2/3 Rule, violates the Fourteenth and Fifteenth

Amendments to the United States Constitution and Section 2 of the Voting Rights Act, 42 U.S.C. §1973;

(4) Enjoining the defendants, their agents and successors in office, and all persons acting in concert or participation with them, from administering, implementing or considering any congressional redistricting proposals until preclearance of the unprecleared redistricting procedure is obtained;

(5) If preclearance is obtained as prayed for above, enjoining the defendants from abandoning the 2/3 Rule on the grounds that the decision to do so is violative of Section 2 of the Voting Rights Act, 42 U.S.C. §1973 and 42 U.S.C. § 1983 and the First, Fourteenth, and Fifteenth Amendments to the United States Constitution.

(6) Ordering the defendants either to seek a declaratory judgment from the United States District Court for the District of Columbia or to submit to the Attorney General for administrative review pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973c, the unprecleared change identified herein;

(7) Awarding plaintiffs all costs and disbursements in maintaining this action, and all reasonable attorneys' fees, pursuant to 42 U.S.C. §1973l(e) and 42 U.S.C. §1988; and

(8) Granting such further relief as the interests of justice may require.

Respectfully submitted,
/s/ Max Renea Hicks
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Appendix D

STATUTE

42 U.S.C. Sec. 1973c

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the

guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

Appendix E

Statement by
Senator Bill Ratliff
July 14, 2003

I have today advised Lieutenant Governor Dewhurst that I am in possession of a statement signed by 10 members of the Texas Senate stating their unalterable opposition to any motion to bring a congressional redistricting bill to the Senate floor. I have advised the Lieutenant Governor that I am adding my name to that statement.

The Senate has now completed hearings across the state on this subject. Chairman Robert Duncan and the members of his committee have reported to the members of the Senate that the overwhelming majority of citizens appearing at these statewide hearings are opposed to such redistricting, including many local activist Republicans and locally elected Republican officials.

It is clear that those who are leading this effort apparently have no knowledge of, or regard for, the representative balance between the urban/suburban power base and the diminishing influence of the rural/agricultural community. The maps produced so far have indicated a total lack of concern for the communities of interest in rural Texas.

The current congressional lines produce 20 Republican seats, 19 of which have a Republican strength of at least 55%. The majority of the Senate members, in both parties, have indicated to me that the costs associated with

this effort are not justified by the marginal gains to the Republican congressional delegation.

Moreover, most members of the Senate fear that the costs of this effort are far more serious than the mere financial cost of the litigation which is sure to follow. The costs anticipated by these members are associated with the level of animosity and distrust among members of the Senate which will result from such a vitriolic battle.

We, in the Senate, pride ourselves in being able to work in a bipartisan manner for the people of Texas – the same bipartisan spirit which President George W. Bush nurtured so vigorously and which he was so proud when he was Governor. I will not be a part of the destruction of that spirit for the sake of a theoretical marginal partisan gain in the Texas congressional delegation.

Appendix F

AFFIDAVIT OF PATSY SPAW

THE STATE OF TEXAS §
§
COUNTY OF TRAVIS §

BEFOREME, the undersigned authority, on this day personally appeared Patsy Spaw, who is personally known to me to be the person subscribing her name below, and after being duly sworn by me according to law, on there oath deposed and stated:

"My name is Patsy Spaw, and I am the Secretary of the Senate and custodian of its records. I am over twenty-one and in all ways competent to sweat out this affidavit. All information provided herein is within my personal knowledge and it true and correct."

"Under Senate Rule 5.12, bills are considered on second reading 'in the order in which the committee reports on them are received by the Senate.' Under Rule 5.13, bills may be taken out of order when 'the regular order is suspended by a vote of two-thirds of the members present."

"Because of these rules, a bill is often introduced at the beginning of a session that is intended to be the first bill out of committee, with an informal understanding that the bill, usually on an innocuous subject, will not be voted upon by the full Senate. This bill is then known as a 'blocker bill' and remains at the top of regular order, and following bills are then taken up on second reading after the regular order of business has been suspended by a two-thirds vote."

"Blocker bills receive no official designation by the Senate; whether or not a bill may be considered 'blocker bill' depends on the Senators' informal understanding or agreement. There is no prohibition against Senators' voting out or otherwise disposing of a purported 'block bill' and thus allowing subsequent bills to be taken up without a need to suspend the rules."

"Furthermore, whether or not a bill is treated by the Senate as a 'blocker bill' depends on the actions taken by many people. First, a Senator must introduce a bill that is not intended for actual passage. The committee considering the bill must then ensure that it is the first bill reported out of committee. Occasionally, a Senator will intend a bill to serve as a 'blocker bill' but the committee will not vote it out in time to be used as such. For example, in 1991, under Lieutenant Governor Bob Bullock, a bill intended to serve as a blocker bill was introduced in the Fourth Called Session of the 72nd Legislature. Although the bill was filed and referred to committee, it was never reported form committee. No other bill served the 'blocker bill' role."

"In some cases, bills that might otherwise have been 'blocker bills' have been voted out of the Senate or otherwise disposed of in order to avoid the need for a tow-thirds vote to take subsequent bills out of order. For example, in 1961, under Lieutenant Governor Ben Ramsey, the Senate disposed of three House bills before reaching H.B. 533, relating to the Texas Liquor Control Act. One bill was postponed by unanimous consent, another was recommitted to committee, and the third was laid out and passed. H.B. 533 was then laid out on second reading without suspension of the regular order. It passed to a third reading on a voice vote with 14 senators recorded as voting

no. Suspension of the three-day rule failed by a 14 to 14 vote."

"Sometimes a bill will not get the two-thirds vote to suspend the regular order, but will be passed later when it arrives at the top of the regular order of business. For example, on Tuesday, June 25, 1968, under Lieutenant Governor Preston Smith, an attempt was made to suspend the regular order of business to bring up H.B.2, a tax bill, on second reading. The motion to suspend failed 14 to 16. The next day was a House Bill day, and H.B.2 was first on the list of House Bills and was laid out before the Senate without a two-thirds suspension vote."

"Often, Senators will vote to suspend the regular order of business even when they are not considering bills out of order. For example, in the Third Called Session of the 62th Legislature, there was only one bill introduced. Nevertheless, the regular order of business was still suspended in order to take up the bill."

"Historically, according to the Senate *Journal* there were many times that the Senate did not recognize a 'blocker bill' and therefore did not suspend the regular order of business by a two-thirds vote when considering bills that were at the top of regular order. Instances where the Senate followed this practice occurred in the Third Called Session of the 63 rd Legislature, the First Called Session of the 59th Legislature, the Second Called Session of the 57th Legislature, and the Second Called Session of the 55th Legislature."

Further, Affiant sayeth not.

/s/ Patsy Spaw
Patsy Spaw, Affiant

SUBSCIRBED TO AND SWORN BEFORE ME, on August 15, 2003, to certify which witness my hand and seal of office.

Notary Public in and for the State of Texas

Appendix G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

GONZALO BARRIENTOS, RODNEY ELLIS, MARIO GALLEGOS, JR., JUAN "CHUY" HINOJOSA, EDDIE LUCIO, JR., FRANK L. MADLA, ELIOT SHAPLEIGH, LETICIA VAN DE PUTTE, ROYCE WEST, JOHN WHITMIRE, and JUDITH ZAFFIRINI,	)
Plaintiffs,	)
	)No.) L03-113
STATE OF TEXAS; RICK PERRY, In His Official Capacity As Governor Of The State of Texas; DAVID DEWHURST, In His Official Capacity As Lieutenant Governor and Presiding Officer Of the Texas Senate,	)
Defendants.	)

DECLARATION OF EDWARD BRIAN GRAHAM

Pursuant to 28 U.S.C. 1746, I, Edward Brian Graham, declare that:

1. My name is Edward Brian Graham. I have previously submitted a sworn Declaration in this case. I reside at 1311 Berkshire Drive in Austin, Texas.

2. At the request of attorney J. Gerald Hebert, I have reviewed the Affidavit of Ms. Patsy Spaw, Secretary of the Texas Senate, dated August 15, 2003, which I understand has been filed with the court in this case. In the affidavit Ms. Spaw outlines the Senate Rules and procedures involved in bringing bills before the Full Senate for debate through a motion to Suspend the Regular Order of Business and the use of what is termed a "Blocker Bill" in that process.

3. While generally correct, Ms. Spaw's account, in my opinion, fails to clearly indicate that the existence of a blocker bill is not a prerequisite to placing a bill before the Senate by virtue of a motion to suspend Senate rules, where such a motion requires either unanimous consent or the votes of an extraordinary majority of the members of the Senate. Consequently, the Affidavit could, quite unintentionally, lead one to the invalid conclusion that where there is no blocker bill, the Senate consistently uses some other method to bring a bill to the Senate Floor. In fact, my research suggests that is clearly not the case.

4. For background, it is necessary to explain that the 'blocker bill' is a proposed piece of legislation that is rushed through the Senate committee process so that it will be the first measure reported from a Senate committee. Under the Senate's operating procedures and Rules, this places the blocker bill at the head of

the official Senate Calendar, which is a list of bills reported from Senate committees in the order in which they were reported from those panels. What makes the blocker bill important is that its author never intends that it will be taken up by the Senate.

5. If the Senate were to operate under the "Regular Order of Business:" it would be required to debate and vote on the bills listed in the Calendar in that order. The result could be that major legislation, which takes longer to be considered and adopted by the committees, would appear far down the list and there might not be time for it to be considered by the Full Senate before the legislative session ends.

6. To avoid that possibility, the Senate uses the method of adopting a motion to suspend the Regular Order of Business rule and take up a bill out of its normal order. The adoption of this motion requires either the unanimous consent of all the Senators present or, in lieu of that, the affirmative vote of two-thirds of the members present (or 21 votes if all 31 Senators are present) even though only a majority vote (16 if all are present) is actually required to enact the bill after a supermajority of senators has agreed to take it up out of order.

7. This practice or procedure of filing a blocker bill and requiring that a supermajority (2/3) of senators vote to take up a bill out of order has been a consistent practice in the Texas Senate for decades. Around the Senate, senators often refer to this process as "the 2/3 Rule".

8. The primary purpose (and benefit) of the use of this suspension method is that it often forces the Senate to reach a compromise on controversial and significant legislation in order to obtain the 21 votes necessary to suspend the rules. (See the attached excerpt from my privately published manual, *The Texas Legislature: A Guide to the Legislative Maze*, for a fuller explanation of the blocker bill system.)

9. It is not clear exactly when the blocker bill system was adopted, however, Ms. Spaw has stated that the Senate has regularly used some sort of a motion to suspend the rules (and therefore requiring a supermajority vote) to bring up a bill for 100 years, with the use of a blocker bill as a part of that method since about 1949.[1]

10. A blocker bill is not absolutely necessary, however. In fact, it is often not used in Special Sessions. However, by Senate tradition, even without a blocker bill, it has been the practice of the Texas Senate to use some form of the suspension method when dealing with controversial and significant legislation. Nor is the use of a blocker bill an official part of the Senate Rules, but over the years it has become an integral part of the legislative process and is well known and highly regarded practice of the Texas Senate.

11. A motion to suspend the rules is not the only method the Senate may use in order to place a bill before the

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[1] See Letter of July 15, 2003, from Ms. Patsy Spaw, Secretary of the Texas Senate, to Senator Leticia Van de Putte (D-San Antonio).

Full Senate for debate. The most commonly used other method is for the presiding officer of the Senate to lay a bill before the Senate without the necessity of any Senator making a motion or any vote on the question. (When this happens the *Senate Journal* will usually indicate it by stating "The President laid before the Senate..." The *Journal* then usually goes on to state whether it is for second or third reading, and shows the caption of the specific bill.)

12. This other method has occasionally been used by presiding officers to bring a controversial measure before the Senate when it has proven impossible to obtain the approval of two-thirds of the senators. However, that is a rare deviation from the established Senate practice or procedure, and it is considered a highly controversial act as well. An attempt to do so is, in fact, at the heart of the current controversy that has blocked the Senate from meeting during the current Second Called Session of the 78th Legislature. An announced plan by then Lt. Governor Hobby to do the same was also the spur for the "Killer Bees" episode in 1979 when a group of Democratic senators broke the Senate's quorum to block passage of a presidential primary proposal.

13. Because the two-thirds rule is usually considered sufficient protection for minority interests, organized efforts to block Senate action by denying it a quorum of members required to meet are rare. It is also quite difficult to arrange for at least 11 senators to be absent at the same time. Prior to the current case, the last such quorum break was in 1993 when the Republican members of the Senate spent a day

hidden in a Capitol building office to block action on a bill they opposed.

14. The principal benefit of using this system on controversial measures is that the procedure bypasses the need to compromise on the legislation. It can also be implemented by the lieutenant governor, in his role as president of the Senate, without any motion or vote by the members of the Senate. In addition, since there is no appeal from his action, this leaves Senators who object to deviating from the Senate's normal no alternatives other than to vote on the bill or to 'break the quorum" by leaving the Senate.

15. The "lay a bill before" system is, however, frequently used by the Senate to allow it to more rapidly pass purely local bills (which affect only one governmental entity) or uncontroversial measures through what is known as the "Local & Uncontested Calendar System". This system places bills before the Senate without a motion to suspend any other rules, but is specifically limited to non-controversial and local bills. That fact is enforced by Senate Rules which provide: (a) that the bill must be recommended for passage on the Local & Uncontested Calendar by the Senate Committee which considered it; (b) that, in turn, it must be approved by a vote of the separate Senate Committee on Administration; and (c) that a complete list of the bills to be included on the Calendar be provided to all senators at least 24 hours before the bills are to be debated.. These requirements are then backed up by a provision that allows any two members of the Senate to remove a bill from the Local &

Uncontested Calendar by simply filing a written notice of objection to the measure. Suspending any of these requirements is virtually impossible, since the Senate rules provide that it requires the unanimous consent of all the members present to do so. (Senate Rules 9.01 through 9.07.)

16. In my opinion, the major failure of Ms. Spaw's Affidavit is that it fails to make clear that the absence of a blocker bill does not mean that the Senate automatically uses the "lay a bill before" method to place bills before the Full Senate. Her failure to make this clear may be interpreted to suggest that the Legislature used that method to pass the majority, if not all, the bills considered by the Senate in the six (6) Special Sessions cited by Ms. Spaw. For example, Ms. Spaw's affidavit (p.2) states that:

> "Historically, according to the *Senate Journal* there were many times that the Senate did not recognize a 'blocker bill' and therefore did not suspend the regular order of business by a two-thirds vote when considering bills that were at the top of the regular order. Instances where the Senate followed this practice occurred in the Third Called Session of the 72nd Legislature, the First Called Session of the 65th Legislature, the First Called Session of the 63rd Legislature, the First Called Session of the 59th Legislature, the Second Called Session of the 57th Legislature, and the Second Called Session of the 55th Legislature.

17. This statement by Ms. Spaw may be technically correct to the extent that a 'blocker bill' was not

being used on these occasions. However, it gives the invalid impression that the Senate did not use a method requiring an extraordinary majority vote in order to consider bills during those sessions when, in fact, it did. It is also noteworthy that Ms. Spaw cited as examples only six (6) of the thirty-five (35) special sessions called during the same period of years covered by her examples.[2]

18. In fact, my review of the official bill histories contained in the Senate Journals for the six Special Sessions cited by Ms. Spaw clearly demonstrates that, even without the use of a blocker bill, most of the legislation considered during those particular Special Sessions reached the Senate Floor as a result of a motion to suspend one or more of the Senate's rules, where either unanimous consent or an extraordinary majority vote was required.

19. A Session by Session review of the particular Special Sessions cited by Ms. Spaw is attached to this memorandum. However, a brief analysis of that review shows the following:

- An estimated 65 bills were placed before the Senate for its consideration during the six special sessions.

- Of these 65 bills, 53 were brought before the Senate by a motion that required either unanimous consent or the affirmative vote of an extraordinary majority of the members of the Senate.

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[2] Texas Legislative Reference Library, printout entitled "Texas Legislative Sessions and Years", August 20, 2003.

- Of the remaining 12 bills "Laid before the Senate" without a vote, 10 had clear racial or political, or both, attributes.

- Included in those 10 measures were: Four bills passed by what has been called the "Segregation Forever" Session in 1957 in its attempt to block the desegregation of public schools in Texas; a bill that would have changed the method used to fill vacancies in the U.S. House of Representatives; a voter registration bill to replace the poll tax that required annual registration with the registration period limited to only 30 days per year; and four bills would have implemented agreements with minority plaintiffs for the reapportionment of the Texas House of Representative and Texas Senate to replace plans more favorable to the Republican Party.

20. My conclusion is as follows: the use of the any method to place a bill before the Senate other than by a motion to suspend the rules (which requires a two-thirds vote of members present under the Senate Rules) is a clear deviation from the normal, established Senate practices and procedures. Moreover, in the few instances cited in the Spaw Affidavit when a procedure has been used to place a bill before the Senate without suspending the senate rules, this has occurred most frequently for bills with some racial or political purposes.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

/s/ Edward Brian Graham
Dated: August 21, 2003 Edward Brian Graham

Attachment:

An excerpt from *The Texas Legislature: A Guide to the Legislative Maze*, 6th Edition, by E. Brian Graham (privately printed November 1999).

The Senate System

The Senate also has a calendars committee but uses it only for local and uncontested bills through a special process known as the Senate Local & Uncontested Calendar. (It is actually the Senate Administration Committee which also takes care of the Senate's housekeeping matters.)

Other bills--including all the major legislation--are brought before the Senate through a system known as 'suspending the regular order of business'.

Under the 'suspending the regular order of business' system bills emerging from Senate committees are placed on a list in the order in which they were reported from the committees. This list is called the 'Senate Calendar.'

If the Senate followed 'the regular order of business,' it would consider the bills in the order they appear on the calendar and would not be able to consider a bill listed somewhere down the calendar until it had completed action on all those which precede it on the list. But, it doesn't. Instead, a 'tradition' has been developed under which bills are 'brought up out of the regular order' by a suspension motion.

This system is designed to ensure that, before a bill comes to the Floor, it has the support of an overwhelming percentage of the senators. It also gives the Senate a way to move important bills directly to the Floor, bypassing the many less significant measures that may precede it on the calendar.

To make this system work, the Senate traditionally places or 'parks' a bill at the very top of the calendar that it never intends to pass. This bill--known as the 'blocker'--serves as a block to all other legislation unless the 'regular order of business' is suspended. (A House Bill--usually one whose Senate companion has already passed the Senate--is also 'parked' on the calendar as the first House bill to make the same system work on House Bill Days when House bills move to the top of the calendar.) No effort is made to debate and pass the bill so none of the bills behind it on the calendar can be considered unless such a motion is made.

On minor bills, this motion can be approved 'by unanimous consent' without the necessity of taking a vote. But, if even one senator 'objects,' the Senate requires a formal vote on the motion to allow debate on the measure.

This *motion requires the support of two-thirds of all the senators* present and voting at the time. This means that *if all 31 senators are present, it will require 21 votes in favor of the motion to bring up the bill.* If 30 are present, it will take 20, and so forth. *(During the first 60 days of the session, the Senate requires a four-fifths vote*, or 25 'yes' votes when all 31 senators are present, to bring a bill up.)

What makes the Senate's procedure unusual is that, *once a normal bill or resolution has been moved off the calendar for debate, it requires that only a majority vote for it to pass the*

Senate. But, while it only takes 16 votes to pass a bill--if all 31 senators are voting--*it takes five more votes just to discuss it.* This means that even if a majority of the senators favor a bill, a minority can defeat it by voting not to suspend the rules. (Constitutional amendments require both a two-thirds vote to be debated and a two-thirds vote to be passed.)

The 'blocker' system is a Senate 'tradition' and not required by the Rules, but, like most Senate traditions, it has strong support. Lt. Governor Hobby honored it on all but two occasions during his term in office--in 1979 when his action resulted in the 'Killer Bee affair' and during the Second Called Special Session in 1989 when he 'reserved the option' of following the regular order of business in order to help pass a controversial measure revising the state's workers compensation insurance laws. However, he did not exercise that option at that time. (See QUORUMS & VOTING.)

The lieutenant governor plays an important role in determining which bills will reach the Senate Floor since a suspension motion can only be made if he agrees to allow it. This means that *Senate members must find a way to convince the lieutenant governor to let them bring their bills up.*

Lt. Governor Hobby used the power to block a suspension vote sparingly. He generally recognized any senator who had complied with the Senate Intent Calendar Rule and who demonstrated that he had enough votes lined up to approve the suspension motion. Lt. Governor Bullock followed Hobby's lead in this area.

Getting the required votes to suspend the rules and take up a bill often requires a senator to make deals with other members of the Senate. He may, for example, be required to trade votes

with other senators and agree to vote to suspend the rules for one of their bills if they agree to vote for his, or he may have to agree to accept some change they want to make to his bill.

Because these negotiations are done off the Senate Floor--often in the members' lounge, which is closed to the public--when the Senate actually votes on a bill, it usually moves very fast. The deals have been cut, the votes are lined up and the bill is passed in only a few minutes. As such, the Senate is often less exciting to watch than the House, where lengthy debates are common.

The Senate requires that the rules be suspended each time the bill comes up. This means the same process of suspending the rules must be used for the Second and Third Readings of the bill. It is, therefore, possible for a bill to pass the Senate on second reading, but fail to pass on third because a senator who voted to suspend the rules the first time refuses to do so again. But--just as in the House--it is rare for a bill which reaches the Floor to be defeated.

Appendix H

DECLARATION OF EDWARD BRIAN GRAHAM

Pursuant to 28 U.S.C. §1746, I, Edward Brian Graham, declare that:

1. My name is Brian Graham. I reside at 1311 Berkshire Drive, in Austin, Texas.

2. A brief description of work experience is as follows: I was employed in or around the Texas Legislature from November of 1971 through the end of the Regular Session in 2001. The specific positions I held during that period included: Capitol news correspondent, 1971-1972; campaign employee for a Republican candidate in a state senate race, 1972; Chief Clerk, House Committee on Elections, 1973-1977 (said to be the first to serve under both two different chairs and two different speakers); Executive Assistant to a Democratic member of the Texas House of Representatives, 1978-1981; assistant committee clerk, Senate Committee on Natural Resources, and press secretary to a minority member of the Texas Senate 1981-1983 (August); Researcher for the Comptroller of Public Accounts working as chief bill reader/analyst in the Legislative Analysis Group, 1983-1990, in which position, I among other things, conducted seminars and authored a manual on legislative rules and procedures (now in its sixth edition); Special assistant and head of Bill Tracking & Analysis section for the Lieutenant Governor, 1991-1998 (February); Texas Legislative Council, 1998-1999 (January); I officially retired from the state at the end of January, 1999, but was employed to conduct special research for the Secretary of the Texas Senate, Regular Session, 1999, and Regular Session, 2001. All those

positions required a knowledge of the history, procedures and rules of the Texas Legislature, as demonstrated by the use of my manual in a private legislative training school in 1999 and by my being requested to provide pre-session training in legislative rules and procedures to the staff of the Texas Sunset Advisory Commission before the last four Regular Sessions. As outside employment I was employed by a number of political campaigns over the years to do legislative research including Peyote McKnight for Governor, 1982; Bob Bullock Comptroller Re-election, 1982; and on a number of occasions by Emory, Young & Associates (political consultants). My educational background is as follows: graduate, Marian High School, Houston, Texas (no longer operating); University of Notre Dame, BA-History (1966); some graduate work, University of Texas at Austin (Government) 1967-68.

3. I was requested by attorney J. Gerald Hebert to review actions of the Texas Senate taken during past redistricting cycles to determine whether there has been a particular practice or procedure in place with respect to congressional redistricting. More specifically, I was asked to determine if the Texas Senate has administered a practice or procedure in considering congressional redistricting legislation that required an extraordinary vote (*i.e.*, a vote of two-thirds or more) of the Texas Senate in order for the full Senate to take up such legislation. As detailed in Exhibit A to this Declaration, which is incorporated herein by reference, my "general finding...is that it appears to have been the practice of the Senate over virtually the entire Century to use methods requiring a vote or the approval of the extraordinary majority of the members of the Senate in order to lay congressional redistricting legislation before the Full Senate for its consideration."

4. With regard to the period from 1971 to the present, my review showed the following:

a. In 1971, during the regular session, the Texas Senate voted to ***Suspend the Regular Order of Business*** by unanimous consent to take up congressional redistricting. To suspend the Regular Order of Business requires an extraordinary or supermajority vote of the senate (a two-thirds vote). Although congressional redistricting legislation passed on second reading by a non-recorded vote, and the constitutional rule requiring a three day reading was suspended by a vote of 23 Aye, 5 Nay (a measure that requires approval of three-fourths of the senate), the measure died in conference committee. In the first called special session of 1971, congressional redistricting legislation ***passed by a combined motion to Suspend the Regular Order of Business***, pass on Second Reading, Suspend the Constitutional Rule and Pass on Third Reading. ***This practice or procedure required an extraordinary or supermajority of votes in order to pass.*** Thus, as of 1971, the practice or procedure used by the Texas Senate in considering congressional redistricting employed an extraordinary majority requirement before the full Senate would consider such legislation.

b. In 1981, Congressional Redistricting in the Senate during the 67th Legislature was

governed by the terms of a Senate Resolution (SR 256), which provided that reapportionment measures were to be placed before the Senate under a Special Order, rather than by a Suspension of the Regular Order of Business. ***SR 256 was adopted by the Senate by a vote of 27 Aye, 1 Nay, and thus was approved by a supermajority.*** SR 256 established that these Special Orders would require only a majority vote for adoption, rather than the two-thirds vote normally required to set a Special Order. The specific provision providing for a Special Order by a majority vote was adopted on a separate vote of 21 Aye, 7 Nay—again a supermajority (three-fourths) of senators.

c. In 1991, an attempted suspension of the Regular Order of Business by unanimous consent, failed***; then the Senate voted to suspend the Regular Order of Business, a measure that requires two-thirds of the Senate,*** by a vote of 21 Aye, 10 Nay. Thereafter, the congressional redistricting bill passed on Second Reading by a voice vote, which was then followed by a vote to Suspend the Constitutional Rule (which requires an extraordinary or supermajority vote of three-fourths of the senate) by a vote of 26 Yeas, 5 Nays. The Constitutional Rule of having a bill lay over for three days having been suspended, the bill was then approved on Third Reading by a vote of 18 Yeas, 13 Nays.

d. In 2001, no congressional redistricting measures were taken up in the Texas Senate. ***At that time, the chair of the Senate Redistricting Committee (State Sen. Jeff Wentworth (R-San Antonio), was publicly quoted as stated that he would be unable to obtain the necessary two-thirds vote to bring a bill to the Senate Floor.***

e. Attempts were made to pass congressional redistricting in both the Regular Session and First Called Session in 2003, but in both cases, no bill was brought to the Senate Floor. ***Press accounts attributed the failure to the inability of the bill sponsors to obtain the necessary two-thirds vote required to suspend the Regular Order of Business*** to consider such a bill. Included in those accounts were reports that all the Democratic members and one Republican member of the Senate had informed the Lieutenant Governor in writing that they would oppose such a motion.

I declare under penalty of perjury that the statements herein are, to the best of my knowledge, true and correct.

Dated: August 10, 2003

/s/ Edward Brian Graham
Edward Brian Graham

EXHIBIT A TO DECLARATION OF BRIAN GRAHAM

Congressional Redistricting and the Texas Senate During the 20th Century

My review of the official Senate *Journal* for the years of 1901 through 2001 shows that the Texas Senate voted on at least eleven (11) bills to reapportion the United States Congressional Districts in Texas over that 100 years.[1]

The general finding of the review is that it appears to have been the practice of the Senate over virtually the entire Century to use methods requiring a vote or the approval of the extraordinary majority of the members of the Senate in order to lay congressional redistricting legislation before the Full Senate for its consideration.[2] All official decisions on how to bring a congressional redistricting bill to the Senate Floor during the period I studied were made by motions on the Senate Floor and by votes of the members of the Senate themselves. In addition, any changes in those procedures were approved by an extraordinary majority vote. The Lieutenant Governor cast no votes on those occasions nor was he empowered to change any of the procedures.

The only significant variation from this policy was in 1981 when only a majority vote was required. However, in the case of 1981, the *Journal* shows that, the decision to change from an extraordinary majority was approved by the

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[1] During the first half of the 20th Century, the Texas Legislature did not reapportion congressional districts in Texas after each national census. It did not begin that practice until after the establishment of the "one-man, one-vote" principle by federal courts in *Baker v Carr* [369 U.S. 186 (1962)]. Prior to that time, it had approved such measures only in 1917, 1933 and 1957. The first act after *Baker v Carr* was in 1965.

vote of an extraordinary majority of the Senate. (The only other possible variation was in a Special Session in 1933 when the Senate considered a bill to move one county from one congressional district to another. This bill was apparently considered what is termed a "local bill" which affects only one Senator and was simply laid out by the Lieutenant Governor. It died in the House of Representatives.)

The analysis reviewed bills voted on by the Full Senate during both Regular and Called or Special Sessions of the Legislature both before and after the adoption of what has been termed the "two-thirds rule" and the accompanying "blocker bill" system by the Senate. It also examined measures passed by the Senate when there was such a "blocker bill" in place and when there was no such measure pending on the Senate Calendar. As noted above, with the one exception in 1981, the policy appears to have been to use an extra-ordinary majority vote in both Regular and Special Sessions of the Legislature both before and after the adoption of the two-thirds rule and with or without a blocker bill.[2] Even in 1981, while the congressional redistricting legislation ultimately was considered by a simple majority of the Texas Senate, such consideration only took place after the Texas Senate had voted 27 to 1 (a near unanimous extraordinary majority) to approve a Senate Resolution (SR

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[2] According to the Secretary of the Senate, the policy of requiring a two-thirds vote to Suspend the Regular Order of Business in order to consider a bill dates back at least 100 years. The Senate's Order of Business Rule was first adopted in 1947. The exact date for the beginning of the practice of using what is termed a 'blocker bill' to enforce that policy is not known, although it is generally attributed to have been adopted by Lt. Gov. Alan Shivers in 1949. Letter of July 15, 2003, from Secretary of the Senate Patsy Spaw to Senator Leticia Van de Putte.

256), which provided that reapportionment measures were to be placed before the Senate under a Special Order requiring only a simple majority.

A listing of the individual measures considered by the Senate during the years of 1901 through 2001 and the method used to lay the proposal before the Full Senate is as follows. All page numbers are from the official *Senate Journal* for the respective Legislature. The method used to place the bill before the Senate is showing in ***bold-faced, italic print.***

35th Legislature (1917)

Regular Session

Measure Senate Bill (SB) 11.

History: ***Placed before the Senate as the result of a motion to set the bill as a "Special Order***--p. 247; Passed to Engrossment (Second Reading) by a non-recorded vote--p. 276; Suspension of the Constitutional Rule by a vote of 25 Yeas, 1 Nays, 1 Present-not-voting, 3 Absent, 1 Absent-excused - p.288; Final passage by a non-recorded vote--p. 288.[3]

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[3] The Rules in use for the 1917 and 1933 sessions appear not to have specified the vote requirement for a Special Order beyond a general provision requiring a two-thirds vote to suspend rules for which the total is not specified. Legislative precedent is to be guided on such questions by the terms of such other publications as *Robert's Rules of Order* and *Mason's Manual of Legislative Procedure Robert's* specifically specifies that a Special Order requires a two-thirds vote (Section 13, Orders of the Day), and *Mason's* suggests the same. (In Sec. 264, it provides that

No congressional redistricting bill was then adopted until the 43rd Legislature in 1933.

43rd Legislature (1933)

Regular Session

Measure: SB 195

History: ***Set as a Special Order***, no vote recorded—591; laid on the table, subject to call, no vote recorded—p. 640; Rules suspended, no vote recorded - 661; considered on Second reading—p. 661; Set as a Special Order—p. 670; passed to engrossment—p. 670; Constitutional Rule suspended by a vote of 27 Yeas, No Nays—670; final passage by a vote of 22 Yeas, 4 Nays—p. 670.

First Called Session:

Measure SB 64. (The bill was virtually a "local bill" that would have moved Duval County from Congressional District 14 to Congressional District 15. By Senate "tradition" such a measure is generally passed without opposition since it affects only the Senate author.)

History: ***Laid before Senate by the Lt. Governor***—p. 189; Point of Order that congressional reapportionment is to last for 10 years and the Legislature had just approved such a

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"Whenever the making of a special order sets aside the general rules regarding the order of business, the same vote is required as would be required to specifically suspend the rules." In our Senate, this would be a two-thirds vote.) In any case, the motions appear to have been adopted in both 1917 and 1933 without objection - i.e. - or by unanimous consent.

measure in the Regular Session, overruled—p. 189; passed to engrossment—p. 189; Constitutional Rule suspended by a vote of 31 Yeas, No Nays—p. 189; final passage—p. 189. The House Committee on Congressional & Legislative Districts subsequently reported the bill "unfavorably" and it died in the House after the Speaker ruled a motion to print a minority report as being out of order. House Journal, pp. 530, 611.

No congressional reapportionment measure was then adopted until the 55th Legislature met in 1957.

55th Legislature (1957)

Regular Session

Measure: House Bill (HB) 229

History: ***Suspension of the Regular Order of Business*** by a vote of 25 Yeas, 7 Nays pp. 122-1223; passed on Second Reading by a voice vote p.1226; Suspension of the Constitutional Rule, failed by a vote o f 18 Yeas, 10 Nays (not obtaining the necessary four-fifths vote) pp. 1226-1227; Suspension of the Regular Order of Business for Third Reading, failed by a vote of 15 Yeas, 12 Nays (not obtaining the necessary two-thirds vote) p. 1336; Suspension of the Regular Order of Business for Third Reading, prevailed by a vote of 18 to 7 p. 1336; amended on Third Reading by a vote of 25 Yeas, 1 Nays (amending of Third Reading requires a two-thirds vote p. 1336; Final passage by voice vote.

Following the United States Supreme Court ruling in *Baker v Carr,* the Legislature next reapportioned the congressional districts in Texas in 1965.

59th Legislature (1965)

Regular Session

Measure: HB 67

History: ***Suspension of the Regular Order of Business*** by a vote of 26 Yeas, 5 Nays, p. 1895; passage on Second Reading by a voice vote—p. 1907; Suspension of the Constitutional Rule by a vote of 27 Yeas, 2 Nays—p. 1907; passage on Third Reading by a voice vote—p. 1907.

62nd Legislature (1971)

Regular Session:

Measure: HB 782

History: ***Suspension of the Regular Order of Business*** by unanimous consent p.1667. Passed on Second reading by a non-recorded vote p. 1675. Constitutional Rule Suspended by a vote of 23 Yeas, 5 Nays p. 1675. Passed on Third Reading by a non-recorded vote p. 1675. Died in Conference Committee.

First Called Session

Measure: HB 782 (Picked up from Regular Session version)

History: ***Passed by a combined motion to Suspend the Regular Order of*** Business, pass on Second Reading, Suspend the Constitutional Rule and Pass on Third Reading by a vote of 25 Yeas, 4 . Journal recorded votes on 2nd and 3rd Reading as voice votes p. 11.

67th Legislature (1981)

Regular Session

Redistricting in the Senate during the 67th Legislature was governed by the terms of a Senate Resolution (SR 256) which provided that reapportionment measures were to be placed before the Senate under a Special Order, rather than by a Suspension of the Regular Order of Business. SR 256 also established that these Special Orders would require only a majority vote for adoption, rather than the two-thirds vote normally required to set a Special Order. ***SR 256 was adopted by the Senate by a vote of 27 Yeas, 1 Nays.*** The specific provision providing for a Special Order by a majority vote was adopted on a separate vote of 21 Yeas, 7 Nays—pp. 337, 356, 357. As such, this deviation from the traditional practice was approved by an extraordinary majority of two-thirds of the Senate. ***In addition, the first time the provision was used it was adopted by an extraordinary majority vote.***

Measure: HB 1400

History: ***Set as a Special Order (majority vote only)*** by a vote of 28 Yeas, 3 Nays (an extraordinary majority)—p. 1408; passed on second reading by a vote of 14 Yeas, 14 Nays, 1 Present-not-voting, President voting Yea to break the tie—pp. 1462-1463; Constitutional Rule Suspended by a

vote of 24 Yeas, 5 Nays—p. 1465; passed on Third Reading by a vote of 16 Yeas, 13 Nays—p. 1465; the bill did not pass the Legislature.

First Called Session

Measure: SB 1

History: Motion to Set the bill as a Special Order, failed by a vote of 11 Yeas, 16—p, 26; Motion to Suspend the Regular Order, failed by a vote of 15 Yeas, 12 Nays (not obtaining the necessary two-thirds vote)—p. 26. Parliamentary ruling that terms of SR 256 (see above) also applied to the Called Session—p. 26; ***Set as a Special Order (majority vote only)*** by a vote of 17 Yeas, 14 Nays—p. 26; passed on Second Reading by a vote of 19 Yeas, 12 Nays; Constitutional Rule Suspended by a vote of 25 Yeas, 6 Nays, final passage by a vote of 19 Yeas, 12 Nays—pp. 131-132.

68th Legislature, Regular Session (1983)

Measure: SB 480 (enacting provisions of court ordered plan)

History: ***Suspension of the Regular Order*** by unanimous consent--p. 947; passed on Second Reading by a voice vote--p. 953; Suspension of the Constitutional Rule by a vote of 24 Yeas, 5 Nays—p. 953. Final Passage by a vote of 23 Yeas, 6 Nays-- 953.

72nd Legislature (1991)

Second Called Session

Measure: HB 1

History: Suspension of the Regular Order of Business by unanimous consent, failed—p. 134***; Suspension of the Regular Order of Business*** by a vote of 21 Yeas, 10 Nays—p. 134; passage on Second Reading by a voice vote—p. 137; Suspension of the Constitutional Rule by a vote of 26 Yeas, 5 Nays—p. 137; passage on Third Reading by a vote of 18 Yeas, 13 Nays—p. 137.

Following a series of court decisions, the House of Representatives passed a congressional reapportionment during the 75th Legislature in 1997 but the bill was not passed by the Senate.

Neither the Texas House or Representatives or the Texas Senate enacted a congressional redistricting measure during the 77th Legislature in 2001.

Appendix I

DECLARATION OF GONZALO BARRIENTOS

Pursuant to 28 U.S.C. §1746, I declare that:

1. My name is Gonzalo Barrientos and I am a member of the Texas Senate.

2. The two-thirds Rule is a practice or procedure of the Texas Senate and is designed to protect a significant minority of Senators (*i.e.,* an excess of one-third) against any piece of legislation that is perceived to be against or harmful to their interests. When the two-thirds Rule is in effect, a third of the Senators present can block any piece of legislation from reaching the Senate floor. The Texas Senate is comprised of thirty-one members: twelve Democrats and nineteen Republicans. Thus, eleven members of the thirty-one member Texas Senate (35.5%) can band together to block a piece of legislation from being considered in the Texas Senate when the two-thirds Rule is in effect.

3. In the 2003 first special session, the two-thirds Rule was in effect in the Texas Senate. After the session started, at least eleven senators joined together and announced that they would oppose any congressional redistricting bill from being considered by the Texas Senate. This had the effect of blocking any consideration of congressional redistricting by the full senate in the first special session of 2003. In 2001, Anglo Republican Senators also utilized the protection of the two-thirds Rule to block a

congressional redistricting plan from being considered by the Texas Senate.

4. Well in excess of 90% of the citizens of Texas who attended public field hearings during June and July 2003 and who took a position on redistricting (more than 6000 Texans in all) indicated that they opposed the Legislature's consideration of congressional redistricting. I am one of eleven Senators who wish to avail myself of the use and protections of the two-thirds Rule in any special session held in 2003 or 2004 so that any congressional redistricting bill cannot be taken up in the Senate. My constituents' interests will be harmed if the protections of the two-thirds Rule are not available in the Senate during any special session held in 2003 or 2004.

5. Nine of the members of the Texas Senate are minority group members: seven are Hispanics and two are African-Americans. Two other Senators, though Anglo, represent majority-minority districts. The unavailability of the two-thirds Rule in any special session in 2003 or 2004 is intended to have, and will in fact have a discriminatory result on minority voters and officeholders on account of their race, color, or membership in a language minority group.

I declare under penalty of perjury that the foregoing information is true and correct.

/s/ Gonzalo Barrientos
GONZALO BARRIENTOS

Dated: 7/8/03